STATE OF MICHIGAN

IN THE SUPREME COURT

Oakland J. McDonald Cpn 10/14/04

FIRAS QARANA,

Plaintiff/Appellee,

v

NORTH POINTE INSURANCE COMPANY,

Garnishee Defendant/Appellant.

Lower Court Case No. 00-022528-NI
Court of Appeals Case No. 244797
Supreme Court Case No. _____

I. MATTHEW MILLER (P51351)
Attorney for Plaintiff/Appellee
30445 Northwestern Hwy., Ste. 140
Farmington Hills, MI 48334
(248) 851-8000

SCOTT L. FEUER (P38185)
Attorney for Garnishee Def/Appellant
Kallas & Henk PC
43902 Woodward Ave., Ste. 200
Bloomfield Hills, MI 48302
(248) 335-5450, Ext. 219

GARNISHEE-DEFENDANT/APPELLANT NORTH POINTE'S APPLICATION FOR LEAVE TO APPEAL

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JUDGMENT OR ORDER APPEALED FROM

Pursuant to MCR 7.301(A)(2), Garnishee-Defendant/Appellant North Pointe Insurance Company (hereinafter "North Pointe"), seeks leave to appeal from the October 14, 2004, opinion of the Michigan Court of Appeals (attached as Exhibit "A").

RELIEF REQUESTED

Defendant North Pointe respectfully requests that this Court grant its Application for Leave to Appeal, reverse the Court of Appeal's decision and reinstate the trial court's order of summary disposition in favor of North Pointe. The decision of the Court of Appeals has effectively:

a. Rewritten the insurance contract to make mandatory a showing of "prejudice" in derogation of the bedrock principle of American contract law that parties are free to contract as they see fit;

b. Treated the insurance contract in question different than other contracts are treated, under the law, which disregards the fundamental mutuality requirement of contract law, which, in effect, requires an insurer to continue to perform its part of the contract, even if its insured refuses to perform its duties under the contract; and

c. Requires an insurer to go to the time and expense of a trial, when **all** of the evidence demonstrates that the insured breached the insurance contract by intentionally not cooperating with its insurer (because the insured filed for Chapter 7 Bankruptcy, thereby discharging its debts), in direct contravention of the cooperation clause of the insurance contract.

STATEMENT OF QUESTIONS PRESENTED

I. **IS IT PROPER FOR THE COURTS TO REWRITE INSURANCE CONTRACTS TO MAKE MANDATORY A SHOWING OF "PREJUDICE", IN DEROGATION OF THE BEDROCK PRINCIPLE OF AMERICAN CONTRACT LAW THAT PARTIES ARE FREE TO CONTRACT AS THEY SEE FIT?**

Garnishee-Defendant/Appellant North Pointe says . . . . . "No."

Plaintiff/Appellee would answer: . . . . . "Yes."

II. **IS IT PROPER FOR THE COURTS TO TREAT A NON-MANDATORY INSURANCE CONTRACT DIFFERENT THAN ANY OTHER CONTRACT, WHICH DISREGARDS THE FUNDAMENTAL MUTUALITY REQUIREMENT OF CONTRACT LAW, SO THAT IF AN INSURED REFUSES TO PERFORM ITS OBLIGATIONS UNDER THE CONTRACT, THE INSURER MUST NEVERTHELESS CONTINUE TO PERFORM ITS PART OF THE CONTRACT?**

Garnishee-Defendant/Appellant North Pointe says . . . . . "No."

Plaintiff/Appellee would answer: . . . . . "Yes."

III. **WHEN ALL OF THE EVIDENCE DEMONSTRATES THAT AN INSURED IS INTENTIONALLY NOT COOPERATING WITH ITS INSURER (BECAUSE THE INSURED FILED FOR CHAPTER 7 BANKRUPTCY, THEREBY DISCHARGING ITS DEBTS), IN DIRECT CONTRAVENTION OF THE COOPERATION CLAUSE OF THE INSURANCE CONTRACT, DID THE COURT OF APPEALS CORRECTLY REVERSE THE TRIAL COURT'S GRANT OF SUMMARY DISPOSITION IN FAVOR OF THE INSURER?**

Garnishee-Defendant/Appellant North Pointe says . . . . . "No."

Plaintiff/Appellee would answer: . . . . . "Yes."

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PREFACE

This is a case where the insured, Paragon Investment Company, d/b/a Royal Oak Music Theater, intentionally disregarded the requests of its insurer to cooperate in the defense of the case brought by plaintiff, Firas Qarana. The insured, Royal Oak Music Theater, filed for Chapter 7 Bankruptcy. There were numerous lawsuits filed against the Royal Oak Music Theater. The Royal Oak Music Theater had incurred substantial debt. Because plaintiff's potential judgment against the Royal Oak Music Theater would be discharged in Bankruptcy Court, the principles of the Royal Oak Music Theater refused to cooperate in the defense of the underlying personal injury case. The trial court, the Honorable John MacDonald in the Oakland County Circuit Court, issued an opinion granting North Pointe summary disposition, finding that its insured had violated the cooperation clause of the insurance contract (Opinion and Order of the Trial Court attached hereto as Defendant's Exhibit "B"). The Court of Appeals reversed the trial court's order granting summary disposition. The court held that, despite the fact that **all** of the evidence indicated that the insured intentionally would not cooperate with the defense, that the defense counsel retained by the insured, despite significant efforts, could have done more in an attempt to convince the insured to cooperate (without stating what more defense counsel could have done). At the heart of this case is whether the courts will treat an insurance contract different than any other contract, by writing in requirements to that contract that do not exist. It is difficult to conceive of a situation in which there could be more blatant non-cooperation than in the instant case – the insured in this case, without using the word "cooperation", informed the insurer that it would not cooperate. When faced with a willful breach of contract on the part of one party to the contract, the other party should not have to perform its part of the contract.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Paragon Investment Company, d/b/a Royal Oak Music Theater, entered into an insurance contract with defendant North Pointe Insurance Company (insurance contract attached hereto as Exhibit "C"). The insured operated as a bar/night club in the city of Royal Oak. Numerous claims and lawsuits were filed against the Royal Oak Music Theater. The Royal Oak Music Theater had other debts.

The plaintiff, Firas Qarana, was allegedly involved in a bar fight on the sidewalk in front of the Royal Oak Music Theater. The plaintiff claims that another patron assaulted him, on the public sidewalk. The plaintiff alleged that the security personnel at the Royal Oak Music Theater failed to stop the fight. The plaintiff filed suit against the Royal Oak Music Theater, alleging negligence in failing to protect the plaintiff from his alleged assailant.

Certain insurance coverage is statutorily mandated under Michigan law. For example, Michigan has statutes requiring motor vehicle insurance and liquor liability insurance. This was not a dramshop claim which would implicate the liquor liability insurance policy that defendant Royal Oak Music Theater may have held. Rather, the case was a negligence case which might fall under the Royal Oak Music Theater's general liability insurance policy. As such, the policy in question was not statutorily mandated. It was optional.

North Pointe issued the non-mandatory general liability insurance policy to Paragon Investment Company, d/b/a Royal Oak Music Theater. This is a contract between Paragon Investment Company d/b/a Royal Oak Music Theater and the North Pointe Insurance Company. There are no other parties to the contract. There were no third party beneficiaries named in the contract. The insurance contract (Exhibit "C"), provided as follows, in relevant part:

SECTION I-COVERAGES
Coverage A. Bodily Injury and Property Damage Liability
1. Insuring Agreement
a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.

SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS
2. Duties In the Event of Occurrence, Offense, Claim of Suit
a. You must see to it that we are notified as soon as practicable of an"occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
(1) How, when and where the "occurrence" or an offense took place;
(2) The names and addresses of any injured persons and witnesses; and
(3) The nature and location of any injury or damage arising out of the "occurrence" or offense.
b. If a claim is made or "suit" is brought against any insured, you must:
(1) Immediately record the specifics of the claim or "suit" and the date received; and
(2) Notify us as soon as practicable
You must see to it that we receive written notice of the claim or "suit" as soon as practicable.
c. You and any other involved insured must:
(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
(2) Authorize us to obtain records and other information;
(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and
(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

Exhibit "B" (emphasis supplied).

This cooperation language is a standard "ISO" form that is commonly used in insurance contracts in Michigan and around the country. The insurance contract clearly and unambiguously states what obligations the insured must fulfill in order to comply with its part of the contract. In any contractual relationship, both parties must perform their end of the bargain.

Plaintiff filed suit against the Royal Oak Music Theater. North Pointe assigned defense counsel to the Royal Oak Music Theater and immediately attempted to defend its insured. The insured, however, willfully and intentionally refused to comply with the above terms and conditions of the insurance contract. The insured provided no information with respect to the occurrence to the attorney hired by North Pointe to defend its insured, Michael Ewing. The Royal Oak Music Theater was a sophisticated commercial entity that understood its rights. In fact, Mr. Ewing dealt directly with corporate counsel for the Royal Oak Music Theater, attorney Michael Novak. In fact, it was Mr. Novak who informed Mr. Ewing that the Royal Oak Music Theater no longer exists and would not cooperate in the defense of the case.

Once North Pointe received the complaint, North Pointe and Mr. Ewing contacted the insured's corporate counsel and designated contact, Michael Novak, as well as the insured's corporate officer, Robert Fox. North Pointe wanted to obtain information about what had occurred, so that it could begin to prepare a defense on behalf of its insured. The following constitutes a time line demonstrating the efforts made by North Pointe and Mr. Ewing to obtain the cooperation of its insured. The following chronology also contains the actions taken by the Circuit Court, in the underlying personal injury action.

CHRONOLOGY OF EVENTS OF UNDERLYING CASE,
QARANA V PARAGON INVESTMENT COMPANY D/B/A ROYAL OAK MUSIC THEATER

Date	Description
5/1/00	North Pointe adjuster, Nancy Foster, wrote Mr. Novak requesting: ▸ Complete the Employee/Witness list - even if you do not know anything about this incident. You should also attach your employee list or payroll records for the people who were working when this incident allegedly occurred. ▸ Have any eye-witnesses to this incident complete a written statement form (write-out what they know about this incident, their version of the facts, and have them sign and date). Make additional copies if necessary. ▸ If there was a police report filed regarding this incident, please provide us with a copy. Exhibit "D", May 1, 2000 Letter from North Pointe adjuster Nancy A. Foster and Reservation of Rights letter.

5/1/00 North Pointe adjuster, Nancy Foster, sent a letter to Mr. Novak reserving North Pointe's rights and confirming that the Insurance Contract requires Paragon's cooperation in order to maintain insurance coverage. Exhibit "D", supra.

5/9/00 Mr. Ewing sent Mr. Robert Fox, Paragon's President and resident agent, a letter requesting employee lists and cooperation. Exhibit "E", May 9, 2000 letter from Mr. Ewing to Mr. Fox.

5/11/00 Mr. Ewing filed his appearance on Paragon's behalf.

5/23/00 Mr. Ewing answered Plaintiff's complaint and also submitted Interrogatories to Plaintiff.

6/23/00 Mr. Ewing was served with Plaintiff's interrogatories and immediately wrote Mr. Fox a letter requesting his answers to interrogatories. Exhibit "F", June 23, 2000 letter to Mr. Fox.

May, 2000 - June, 2000 During this time, Mr. Ewing was trying to talk with Mr. Fox and Mr. Novak about the case, witness lists, and relevant information. To no avail, Mr. Fox and Mr. Novak did not return phone calls or attempt to respond to written requests for information. Exhibit "G", Mr. Ewing's July 30, 2002 Deposition Testimony, pp 20-22. Mr. Ewing testified:

Q. [By Appellant's counsel, Matthew Miller] So was it likely that there actually was no phone call during that time, or now you think there may have been?

A. No, there would have been, Matt, because on May 9 [2000], when I wrote the letter to Fox, I asked him, additionally, I would ask that you immediately forward to my office a complete list of names of your employees who were working on the date of the incident. So there would have been a follow-up phone call, and I also cc-ed Novak on the May 9 letter, either to Fox or Novak, asking for names of employees, because I understood what the complaint said and I needed those names to figure out if the allegations in the complaint were legitimate, and I basically was stonewalled for whatever reason. I didn't know if they knew that the bankruptcy was coming and they were just putting Ewing off until the petition was filed or what they were doing. But for whatever reason, Matt, I never did, to this day, know who worked that night. Exhibit "G", supra, pp 21-22.

7/14/00 Mr. Ewing writes Mr. Novak advising him that the trial is scheduled for January 25, 2001. Exhibit "H", July 14, 2000 letter from Mr. Ewing to Mr. Novak.

July, 2000 - August, 2000 Mr. Ewing diligently calls Mr. Novak numerous times in attempt to have compliance to answer Plaintiff's interrogatories and defend Paragon in Plaintiff's lawsuit. Mr. Ewing testified:

Q. There is no letter between July 26 and August 18. What exactly did you do

between July 26 and August 17 to endeavor to get the information requested in the interrogatories and the request for production of documents from June 22, 2000?

A. I would have had phone conversations with Mike Novak.

Q. Are you sure you spoke to Mr. Novak?

A. I'm positive.

Q. What did Mr. Novak tell you regarding the names of the people who worked there?

A. He didn't know, he would look into it, he would get back to me, he has this, that, and other things to do. I responded that I needed the answers.

I finally had a conversation with him sometime – August 17 is my wedding anniversary, so I remember that date well. I think it was August 10, about a week before. I had a phone conversation with him , and he said they're filing bankruptcy, he's disinterested. I told him what can happen, he was even more disinterested, and I never got the answers. But I'm sure that I, between these periods of time, July 26, 2000 and the date that I wrote you the letter informing you of the bankruptcy, I had telephone conversations with Mr. Novak, and my feeling is, Matt, they knew that it was coming and were not interested in defending lawsuits. Exhibit "G", supra, pp 23-24.

During this time period, Mr. Ewing also ordered the police report, which was filed by Plaintiff a week after the accident.

8/17/00 Paragon filed Chapter 7 Bankruptcy in the Eastern District of Michigan. The bankruptcy filing invoked the Automatic Stay provisions in the Bankruptcy Code, thereby staying all previously filed lawsuits including Qarana v Paragon, et al.

10/26/00 Automatic stay lifted as to Qarana v Paragon, et al.

11/29/00 Mr. Ewing writes Mr. Novak regarding a pre-trial/settlement conference. Mr. Ewing also notifies Mr. Novak that his presence is mandatory. Exhibit "I", November 29, 2000 letter from Mr. Ewing to Mr. Novak.

12/20/00 Mr. Ewing notifies Mr. Novak that the Jury Trial has been rescheduled. Exhibit "J", December 20, 2000 letter from Mr. Ewing to Mr. Novak.

1/3/01 Plaintiff's Motion to Compel is heard in front of Judge Howard in Oakland County Circuit Court. Plaintiff's counsel, Mr. Landman, states on the record:

Your Honor, I suspect the Court has had a chance to see the very brief motion and very brief response. I think we're entitled to the discovery. **It's unfortunate that Mr. Ewing is not getting more cooperation from his**

client or from the client's corporate counsel. Nevertheless, we've got mediation coming up in April and we'd certainly like getting to be able to complete our discovery before then. Exhibit "K", January 3, 2001 Motion to Compel hearing transcript (emphasis added).

1/3/01 Judge Howard granted Plaintiff's Motion to Compel. Exhibit "L", January 3, 2001 order.

1/3/01 Mr. Ewing writes Mr. Novak informing Mr. Novak of Judge Howard's order.

> I am aware as well as Judge Howard is award that Paragon is a defunct corporation as the result of bankruptcy. However, your policy of insurance requires that Paragon cooperate with defense of this matter. You indicated your unwillingness to provide discovery given the corporation's defunct status which resulted in Judge Howard's order. Judge Howard may very well enter a default judgment in the event his order is not complied with. Moreover, North Pointe Insurance Company (NPIC) may very well file a declaratory judgment action against Paragon seeing a ruling that is under no duty to indemnify or defend Paragon given its uncooperative status. Furthermore, I may be forced to withdraw my representation if Paragon continues to fail to cooperate with defense of this matter. Please contact the undersigned upon receipt of this letter in an effort comply with the order. Exhibit "M", January 3, 2001 letter from Mr. Ewing to Mr. Novak.

1/8/01 Letter from Mr. Novak to Mr. Ewing. Mr. Novak writes:

> Pursuant to our telephone conversation of today this letter shall confirm that it is impossible for Paragon Investment Company to Answer Plaintiff's Interrogatories and Request for Production of Documents as Paragon no longer exists. As you are aware, on August 17, 2000 Paragon filed a Voluntary Petition under Chapter 7.
>
> Judges Rhodes appointed Mark Shapiro (248) 352-4700 as Trustee of Paragon, perhaps he could be of assistance. Again, it is regrettable that this company no longer exists, and it is impossible for me to assist you with the requested information. Exhibit "N", January 8, 2001 letter from Mr. Novak to Mr. Ewing.

1/10/01 Mr. Ewing writes the Bankruptcy Trustee Mark H. Shapiro asking for his cooperation or if he can assist in the defense of this matter. Exhibit "O", January 10, 2001 letter from Mr. Ewing to Mr. Shapiro.

1/11/01 Bankruptcy Trustee Mark H. Shapiro writes Mr. Ewing stating "Although I am more than happy to accommodate you and assist in any way possible, I am unsure as to what, if any assistance, I can be, given my lack of information as to the facts and circumstances giving rise to lawsuit you are currently defending." Exhibit "P", January 11, 2001 letter from Mr. Shapiro to Mr. Ewing.

1/16/01 Mr. Ewing writes Mr. Novak stating:

> Enclosed please find a letter from the bankruptcy trustee, Mark Shapiro. In response to your latest correspondence, I wrote Mr. Shapiro requesting any assistance that he may provide in answering discovery requests. He is unable to do so as stated in his letter. As you know, the discovery requests were to be fully and completely answered by Paragon on January 17th, per Judge Howard's order. Sanctions for failing to comply with the order as stated to you earlier may very well involve the entry of a default judgment which North Pointe will not satisfy. Exhibit "Q", January 16, 2001 letter from Mr. Ewing to Mr. Novak.

1/17/01 Mr. Ewing writes Mr. Novak stating:

> I learned today from plaintiff counsel that he will be filing a motion for entry of default judgment in front of Judge Howard scheduled for January 31, 2001. Due to lack of cooperation in defense of this matter and in light of our earlier conversations and correspondence, I expect to get authority to withdraw my representation. I plan to bring this before Judge Howard on January 31st as well. Exhibit "R", January 17, 2001 letter from Mr. Ewing to Mr. Novak.

1/17/01 Mr. Novak writes Mr. Richard Carron of North Pointe.

> I am in receipt of your letter of January 15, 2001 regarding outstanding Paragon Investment Company claims. As you are aware, Paragon Investment Company was dissolved by Order of the U.S. Bankruptcy Court. This entity no longer exists. There are no employees to contact. There are no records for me to obtain. Accordingly, I am at a loss to assist you in defending the actions you referred to in your letter of January 15th. Exhibit "S", January 17, 2001 letter from Mr. Novak to Mr. Carron.

Jan. 2001 Mr. Ewing calls Mr. Shapiro:

Q. All right. There's a letter dated January 10, 2001 to Mark Shapiro in your file.
A. Right.
Q. Is that the letter you're referring to?
A. Yes, that's it.
Q. Prior to this letter, did you have any contact with Mr. Shapiro?
A. Yes, telephone conversation, I remember. I recall a telephone conversation with him, Matt. I don't know the substance of it other than I think Mark Shapiro may have been inquiring about harassment, I think is the term he used, of me of Novak trying to figure out what the answers were, and he wanted to inform me that they were in bankruptcy, and I said, I know that, I know that, but it's been lifted, I need to defend the case, that kind of thing. He wasn't offensive, but Mr. Shapiro wanted to let me know for sure that it was in bankruptcy and that he was the one kind of answering on behalf of I guess the debtor, which is Paragon, and I took it kind of as a back off of

Mr. Novak, it's in bankruptcy now. And then I asked him if he could please provide answers to interrogatories and he couldn't, could not do it. Exhibit "G", supra, pp 40-41.

1/31/01 Mr. Miller's Motion to Compel and Mr. Ewing's Motion to Withdraw are contemporaneously heard in front of Judge Barry Howard. Judge Howard grants Mr. Ewing's motion to withdraw based upon Paragon's failure to cooperate with Mr. Ewing or North Pointe in defense of Appellant's lawsuit. Appellant's counsel does not object to the withdrawal. As to Appellant's Motion to Compel, Judge Howard grants Paragon thirty days to hire a new lawyer or proceed in pro per. Paragon is also ordered to answer discovery by March 7, 2001. Exhibit "T", transcript of January 31, 2001 Motion Hearing before Judge Barry Howard and corresponding orders.

1/31/01 North Pointe's adjuster, Ms. Pominville, writes Mr. Novak:

> The attorney assigned by North Pointe to defend you in the above referenced matter, has made numerous attempts to contact you to gain your cooperation in the defense of this claim. Your policy requires that you cooperate with us in the investigation, settlement or defense of a claim or suit. Accordingly, North Pointe Insurance Company is reserving its right to deny coverage of this claim in the event your failure to cooperate prejudices our ability to defend against this claim. You should contact your attorney within fourteen days of your receipt of this letter to prevent a denial of coverage on this claim. Exhibit "U", January 31, 2001 letter from Ms. Pominville to Mr. Novak.

As this chronology demonstrates, Mr. Ewing consistently and diligently attempted to obtain the insured's cooperation. Mr. Ewing's efforts, letters, correspondence and telephone calls are all evidence of his extensive efforts. The insured, through its bankruptcy trustee, Mr. Shapiro, even accused Mr. Ewing of harassment, because he made such numerous attempts in his efforts to gain the cooperation of the insured. Mr. Ewing's affidavit, which was submitted in the trial court record, is attached hereto as Exhibit "V".

Mr. Ewing had previously represented the Royal Oak Music Theater on some of its lawsuits. There was never a problem with obtaining the insured's cooperation in those cases. Clearly, the insured and its corporate counsel knew that the Royal Oak Music Theater needed to cooperate in order to secure coverage. It was only after the insured decided to file Chapter 7 Bankruptcy, which would discharge its debts, that it decided to willfully not cooperate. The above chronology sets out

a pattern of willful disregard and non-cooperation in contravention of the clear and unambiguous terms set forth in the insurance policy. This is clearly a situation where the insured no longer needed the benefit of the insurance contract, since they were filing for bankruptcy. Any judgment entered against them would be discharged. As such, the insured willfully breached the contract. Once the contract was breached by the insured, then the insurer no longer had an obligation to perform its part of the bargain.

It is a fundamental principle that an attorney defending a case must be able to meet with his client and any witnesses in order to formulate a defense. It is fundamental that a defense attorney must have the cooperation of his client in order to respond to discovery served upon the defendant. The Court of Appeals held that there was a "lack of effort" on the part of Mr. Ewing to "otherwise defend the lawsuit" (Court of Appeals slip opinion, p 5). Despite making such a statement, the Court of Appeals does not indicate what additional efforts Mr. Ewing could or should have taken. Plaintiff, in his Court of Appeals brief, indicates that Mr. Ewing could have done such things as taken other depositions. This ignores the fact that every trial attorney knows, whether it is a civil or criminal case, that the defense of a case must first start with a meeting with the defendant to discuss the incident. The defense attorney must know what happened or be pointed to some witnesses, such as employees who were working on the night in question, in order to determine what defenses may be applicable and what defenses will be pursued in the case.

It is always easy to second guess an attorney's strategy. Any seasoned trial attorney also knows that it is not advantageous to go off in a haphazard fashion and take depositions without knowing what took place and what the defenses to the case might be.

The plaintiff in the underlying case served upon the defendant discovery requests, which included a first set of interrogatories and a request for production of documents. This discovery was immediately provided to the insured to cooperate in providing answers. See Exhibits "F", "G", "N" and "V".

When answers to this discovery were not forthcoming, the underlying plaintiff filed a motion to compel discovery. The court granted that motion and ordered that the discovery be provided by the insured by January 17, 2001. Mr. Ewing's affidavit, testimony and written correspondence demonstrate that he immediately notified the insured and its corporate counsel of the court's order. He renewed his numerous requests for assistance in responding to the discovery and obtaining the information relative to the lawsuit. See Exhibits "F", "G", "M", "O", "Q", "R" and "U". The insured refused to comply by not responding to phone calls or letters. Mr. Ewing continuously attempted to contact the corporate representative, Mr. Fox, Mr. Novak, the corporate attorney and, finally, Mr. Shapiro, who was the bankruptcy trustee for the insured. Mr. Fox willfully refused to cooperate or comply with Mr. Ewing's continued requests. The insured's corporate counsel, Mr. Novak, responded that the insured no longer exists and that, therefore, discovery could not be provided. Exhibit "N". Of course, simply because a corporation files for bankruptcy, it does not mean that all of its documents, payroll records, schedules, automatically disappear.

As noted, after the insured willfully refused to cooperate, Mr. Ewing then contacted the insured's corporate attorney. After the insured's corporate attorney refused to cooperate, Mr. Ewing then contacted the insured's bankruptcy trustee, Mark Shapiro. Mr. Shapiro indicated that he had no information and could not help. Exhibit "P".

It was only at that point, when all other efforts had been exhausted, that Mr. Ewing filed a motion to withdraw as counsel for the insured. The court heard the motion and granted the motion on January 31, 2001. See Exhibit "T". Judge Barry Howard of the Oakland County Circuit Court, after hearing about the pattern of willful non-cooperation on the part of Mr. Ewing's client, granted the motion. Judge Howard certainly recognized that an attorney cannot ethically continue to represent a client when the client refuses to cooperate in the case.

The order allowing Mr. Ewing to withdraw as counsel was served upon the insured's representatives. Despite that, again, because they had filed for Chapter 7 Bankruptcy, the insured

refused to take further action. As such, a default judgment was entered against the insured on March 14, 2001, in the amount of $85,846.12, plus interest.

After the default judgment was entered, the plaintiff served a writ of garnishment upon North Pointe. The plaintiff alleges that North Pointe is indebted to its insured under the general liability policy of insurance issued to the insured and that the plaintiff is entitled to have his judgment paid from the amounts allegedly due to the insured under the policy. North Pointe responded to the writ of garnishment and denied liability because the insured had breached the cooperation clause of the insurance contract. In addition, the insured's failure to cooperate fatally compromised the ability of North Pointe to defend the underlying suit against the insured.

The plaintiff filed a motion for summary disposition in the Circuit Court. North Pointe responded and filed a counter-motion for summary disposition. Judge John McDonald of the Oakland County Circuit Court denied the plaintiff's motion for summary disposition and granted North Pointe's motion for summary disposition, in an opinion and order dated October 23, 2002, attached hereto as Exhibit "B". In granting North Pointe's motion for summary disposition, Judge McDonald correctly held:

> The Court finds that Garnishee-Defendant has stated a valid defense to the garnishment pursuant to *Coburn v Fox*, 425 Mich 300 (1986) and *Brogdon v AM Auto Ins. Co.*, 290 Mich 130 (1939). The breach of a cooperation clause constitutes a valid defense to payment under a non-mandatory indemnity policy. Here, Paragon's lack of compliance with the policy's cooperation clause has been established by Mr. Ewing's affidavit concerning his withdrawal, and the failure to respond to discovery. It has been established that Paragon completely failed to cooperate with its defense.
>
> ***
>
> Although the case has no precedential value, the Court nonetheless found the case of *Hastings Mutual Ins. Co. v Auto Owners Ins. Co.*, No. 232947, September 17, 2002, to be instructive. In this case, as in *Hastings*, there is ample evidence in the record showing North Pointe, through attorney Ewings' (sic) efforts to communicate with its insured and encourage its cooperation in the underlying suit. In this case, as in *Hastings*, the Court finds that North Pointe did not "sit idly by, knowing of the litigation, and watch the insured become prejudiced." *Hastings*, supra, at pg 3 citing *Burgess v AM Fidelity Fire Ins. Co.*, 107 Mich App 625, 630

(1981). The Court finds that North Pointe was prejudiced by Paragon's lack of cooperation and thus North Pointe is not obligated under the policy to satisfy the underlying judgment.

Accordingly, plaintiff's motion for summary disposition is denied and defendant's motion for summary disposition is granted.

Judge McDonald's opinion was based on the overwhelming evidence North Pointe presented in the trial court, which demonstrated the efforts made by one party to the contract, North Pointe, to gain the cooperation of the other party to the contract, Paragon Investment Company d/b/a Royal Oak Music Theater. It was based upon the Royal Oak Music Theater's willful failure to cooperate in the defense of the case. The plaintiff in this case, Firas Qarana, steps into the shoes of the insured, in this garnishment action. The insured should not be allowed to shirk any responsibility it has under the contract and then claim that the other party to the contract failed in its efforts to convince the insured to cooperate. The insured, particularly in this case, when it is a sophisticated commercial entity represented by corporate counsel and by a bankruptcy trustee, should not be able to shirk its responsibilities and point the finger at the insurer, when it was the insured's willful non-cooperation that breached the insurance contract in the first case.

Reasonable minds could not differ with respect to whether the insured breached the insurance contract by its willful non-cooperation. All of the evidence demonstrates that the insured breached the contract. All of the evidence indicates that the insurer was prejudiced by that breach, since a default judgment was entered in favor of the plaintiff. Judge McDonald correctly held that summary disposition should be entered pursuant to MCR 2.116(C)(10). The Court of Appeals, which held that the issue presented a question of fact, should be reversed.

ARGUMENT

I. IT IS IMPROPER FOR THE COURTS TO REWRITE INSURANCE CONTRACTS, TO MAKE MANDATORY A SHOWING OF "PREJUDICE", IN DEROGATION OF THE BEDROCK PRINCIPLE OF AMERICAN CONTRACT LAW THAT PARTIES ARE FREE TO CONTRACT AS THEY SEE FIT.

The contract in question, Exhibit "C", states that the insured must cooperate with the insurer in the defense against a lawsuit filed against the insured. Insurance policy Section IV.2. Nowhere in the insurance policy is there a requirement that the insurer must demonstrate that it was prejudiced by the insured's lack of cooperation. The issue, therefore, before this Honorable Court, is whether Michigan courts should write in a provision to the contract that states that the insurer not only must show non-cooperation, as agreed to by the parties in the contract, but the insurer must also demonstrate that it was prejudiced by such non-cooperation.

This Court, in *Wilkie v Auto Owners Ins. Co.*, 469 Mich 41; 664 NW2d 776 (2003), held that an insurance contract should be treated no different than any other contract. In that case, this Court held that parties have the freedom to enter into a contract as they deem fit without interference from the courts. This Court clearly held that in Michigan, an unambiguous, non-mandatory insurance contract should be enforced as written.

In *Wilkie*, the issue before this Court was whether the rule of "reasonable expectations" was viable in Michigan. This Court recognized that such a rule, in which activist courts rewrite insurance contracts, is anathema to the fundamental right of free citizens to enter into business contracts as they see fit. This Court stated:

> This approach, where judges divine the parties' reasonable expectations and then rewrite the contract accordingly, is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy. This Court has recently discussed, and reinforced, its fidelity to this understanding of contract law in *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002). The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and

irrefutable. It draws strength from common-law roots and can be seen in our fundamental charter, the United States Constitution, where government is forbidden from impairing the contracts of citizens, art I, §10, cl. 1. Our own state constitutions over the years of statehood have similarly echoed this limitation on government power. It is, in short, an unmistakable and ineradicable part of the legal fabric of our society. Few have expressed the force of this venerable axiom better than the late Professor Arthur Corbin, of Yale Law School, who wrote on this topic in his definitive study of contract law, *Corbin on Contracts*, as follows:

> One does not have "liberty of contract" unless organized society both forbears and enforces, forbears to penalize him for making his bargain and enforces it for him after it is made. [15 Corbin, Contracts (Interim ed), Ch 79, §1376, p.17].

Wilkie, at 51-52 (footnotes omitted).

Like the rule of "reasonable expectations", the rule requiring "prejudice" has been written into contracts by activist courts. Inserting the "prejudice" requirement into contracts runs afoul of long-standing Michigan case law that policies of insurance are much the same as other contracts; they are matters of agreement by the parties and the job of the court is confined to determining what the agreement was and to enforce the agreement accordingly. *Eghotz v Creech*, 365 Mich 527, 530; 113 NW2d 815 (1962); *Murphy v Seed-Roberts Agency*, 79 Mich App 1, 7; 261 NW2d 198 (1977). Like any other contract, an insurance policy constitutes a contract agreement between the insurer and the insured. *West American Ins. Co. v Meridian Mutual Ins. Co.*, 230 Mich App 305, 310; 583 NW2d 548 (1998); *Zurich American Ins. Co. v Amerisure Ins. Co.*, 215 Mich App 526, 530; 547 NW2d 52 (1966). An insurance policy is an agreement between parties that the court interprets "much the same as any other contract" to best effectuate the intent of the parties and the clear, unambiguous language of the policy. *Auto Owners Ins. Co. v Harrington,* 455 Mich 377, 381; 565 NW2d 839 (1997), quoting *Auto Owners Ins. Co. v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992).

This Court has on many occasions held that the law with respect to insurance contracts is no different than the law with respect to other contracts. That may differ if there is a statute mandating such insurance, such as is required under the Michigan No-Fault Act and the Michigan

Dramshop Act. In the case of a non-mandatory insurance contract, such as the insurance contract in the instant case, however, the same principles apply. *Bowen v Prudential Ins Co of America*, 178 Mich 63; 144 NW 543 (1913). "A contract of insurance rests upon and is controlled by the same principles of law applicable to any other contract." *Bowen*, supra, at 69. This Court recognized the prejudice requirement in a non-commercial insurance case, in *Allen v Cheatum*, 351 Mich 585; 88 NW2d 306 (1958). *Allen* involved a non-commercial, automobile policy of insurance. The insured was unsophisticated. The insured was far different than the insured in the instant case, which was a sophisticated business entity which had consulted with its corporate attorney along with the bankruptcy trustee.

Justice Voelker, in his opinion in *Allen*, held that the non-cooperation of the insured must be substantial, material and prejudicial. North Pointe maintains that the law governing all contracts already has a requirement that the breach must be a "material breach." This Court acknowledged the "material breach" requirement in *Walker & Co v Harrison*, 347 Mich 630, 635; 81 NW2d 352 (1957); *Livingston Shirt Corp v Great Lakes Garment Mfg Co*, 351 Mich 123; 88 NW2d 614 (1958).

The plaintiff may attempt to argue that the requirement for prejudice must be read into insurance contracts, in order to insure that an insurance company will not deny coverage for minor breaches of the insurance policy, i.e., the failure by a few days of reporting a claim, not responding to letters quickly, etc. The plaintiff will probably also argue that such breaches could give an insurance company an incentive to "set up" a non-cooperation situation in order to avoid coverage. Those considerations, however, can be dealt with the same way as they are in any other contract. The breach of contract must be "material". That is the law governing all contracts in Michigan. Certainly, in the instant case, a reasonable person could not find that the insured's willful failure to cooperate was not "material" to the case. The "proof is in the pudding", i.e., the default judgment that was entered against the insured.

This Court made clear in *Wilkie* that it would not tolerate judicial intervention into the

freedom of contract. The Court held in *Wilkie*:

> In contrast to this legal pedigree extending over the centuries, the rule of reasonable expectations is of recent origin. Moreover, it is antagonistic to this understanding of the rule of law, and is, accordingly, in our view, invalid as an approach to contract interpretation.
>
> ***
>
> Therefore, stating that ambiguous language should be interpreted in favor of the policy holder's reasonable expectations adds nothing to the way in which Michigan courts construe contracts, and thus the rule of reasonable expectations should be abolished.
>
> The rights and duties of parties to a contract are derived from the terms of the contract. *Evans v Norris*, 6 Mich 369, 372 (1859). As this Court has previously stated, "The general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts." *Terrien*, supra at 71, quoting *Twin City Pipeline Co v Harding Glass Co*, 283 US 353, 356; 51 S.Ct. 476; 75 L.Ed. 1112 (1931). Under this legal principle, the parties are generally free to agree to whatever they like and, in most circumstances, it is beyond the authority of the courts to interfere with the parties' agreement. *St. Clair Intermediate School Dist v Intermediate Ed Ass'n*, 458 Mich 540, 570-572; 581 NW2d 707 (1998). **Respect for the freedom to contract entails that we enforce only those obligations actually assented to by the parties.** *Evans*, supra, at 372. We believe that the rule of reasonable expectations markedly fails in this respect. The words of Justice Kavanaugh bear repeating:
>
> > [T]he expectation that a contract will be enforceable other than according to its terms surely may not be said to be reasonable. If a person signs a contract without reading all of it or without understanding it, under some circumstances that person can avoid its obligations on the theory that there was no contract at all for there was no meeting of the minds.
> >
> > But to allow such a person to bind another to an obligation not covered by the contract as written because the first person thought the other was bound to such an obligat ion is neither reasonable nor just.
>
> Accordingly, we hold that the rule of reasonable expectations has no application in Michigan, and those cases that recognize this doctrine are to that extent overruled.

Wilkie, at 52, 62-63 (emphasis supplied; footnotes omitted).

Similarly, the rule that "prejudice" should be written into every insurance contract has no

application in Michigan. If *Allen* should be recognized as requiring such, it was impliedly overruled in *Wilkie*. Every contract contains a requirement that for there to be a breach of contract, the breach must be a "material breach." As such, for there to be a finding that the insured breached the cooperation clause of an insurance contract, there must be a material breach of the cooperation clause. The courts should not, however, write into the contract a requirement that the insurer must also prove prejudice.

A survey of American law demonstrates that the majority of courts around the country add the requirement of prejudice to insurance contracts. A minority of courts have held that a material breach of the cooperation clause is sufficient to relieve the insurer of its liability, without the necessity of the insurer demonstrating prejudice. See 9 A.L.R. 4th 218, for a survey of the majority and minority position taken by courts across the country.

The Court of Appeals, in its opinion, chose to quote out of state courts that follow the majority rule, i.e., cases from Iowa and Illinois. It is respectfully submitted that such opinions are not reliable authority, since those states have not recognized the principle of freedom of contract without court intervention to rewrite the terms of the contract, as this Court has recognized in Michigan.

North Pointe maintains that the parties should be allowed to have the freedom to contract without the court intervening and adding terms to the contract, such as the requirement of "prejudice". Defendant maintains that the minority view, that once there has been a material breach, no prejudice need be shown, is the more logical view, which does not impinge upon the freedom of contract.

This Court, in other contexts, has also recognized the principle that parties should have the freedom to enter a contract as they see fit. This Court, in *Quality Products & Concepts Co v Nagel Precision*, 469 Mich 362; 666 NW2d 251 (2003) held that a party cannot unilaterally alter the terms of the original contract. This Court once again made clear that the Court's obligation was to

"respect and enforce the parties' unambiguous contract absent mutual assent to modify that contract." 469 Mich at 380.

The courts should restrain themselves from adding terms to an unambiguous contract that is not statutorily required. The Court of Appeals erred by interjecting a clause requiring that North Pointe demonstrate that it was "prejudiced" by the insured's non-cooperation. As such, North Pointe would respectfully request that this Honorable Court grants it Application for Leave to Appeal, or, in the alternative to peremptorily reverse the Court of Appeals' decision and reinstate the trial court's order for summary disposition in favor of North Pointe.

II. IT IS IMPROPER FOR THE COURTS TO TREAT A NON-MANDATORY INSURANCE CONTRACT DIFFERENT THAN ANY OTHER CONTRACT SINCE, TO DO SO, WOULD DISREGARD THE FUNDAMENTAL MUTUALITY REQUIREMENT OF BASIC CONTRACT LAW AND WOULD FORCE THE INSURER TO CONTINUE TO PERFORM ITS PART OF THE CONTRACT EVEN IF AN INSURED REFUSES TO PERFORM ITS OBLIGATIONS UNDER THE CONTRACT.

As noted in Argument I, this Court has repeatedly made clear that an insurance contract should be treated as any other contract is treated under law. Mutuality of obligation is an essential element of every contract under Michigan law. *Bastian v JH DuPrey Co*, 261 Mich 94; 245 NW 581 (1933). Mutuality of obligation means that both parties to an agreement are bound, or neither one is bound. *Bancorp v Teamsters Welfare Fund*, 231 Mich App 163; 585 NW2d 777 (1998); *Reed v Citizens Ins Co*, 198 Mich 443, 448; 499 NW2d 22 (1993); *Domas v Rossi*, 52 Mich App 311, 315; 217 NW2d 75 (1974); *Bernstein, Bernstein, Wile & Gordon v Ross*, 22 Mich App 117, 120; 177 NW2d 193 (1970).

The Court of Appeals in the instant case held that "the insurer must use reasonable diligence in obtaining the insured's cooperation", slip opinion, p 3. The Court of Appeals also cited cases from other states finding that summary judgment was improper for the insurer when the insurer failed to take a statement or deposition of witnesses. Slip opinion, p 4. The Court of

Appeals' opinion, when read as a whole, seems to indicate that although North Pointe did establish that the insured breached the cooperation clause of the contract, there remains a question of fact as to whether North Pointe did everything it could have done in an effort to secure the insured's cooperation. Of course, the contract contains no such requirement. Once again, the Court of Appeals has written in a clause to the contract that simply does not exist.

Basically, the Court of Appeals' opinion holds that despite the fact that the insured breached the contract, the insurer must nevertheless take great pains in an effort to convince the other party to the contract, the insured, to remedy its breach. The Court seems to indicate that North Pointe had the duty to take every step possible (without articulating what those steps might be) in an effort to convince its insured to cooperate. Once again, such a requirement flies in the face of the principal of freedom of contract. Unless the terms of the contracts so require, there is no requirement under law that forces one party to the contract to attempt to convince the other party to perform its end of the bargain. Rather, the law is just the opposite – the mutuality of obligation rule dictates that once one party to the contract breaches the contract, then the other party is not bound by the contract.

In the instant case, once its insured breached the contract, then North Pointe was relieved of its obligations under the contract. The Court of Appeals held that there was a question of fact as to whether "the insurer used reasonable diligence in obtaining the insured's cooperation." Slip opinion, p 3. The Court of Appeals, quoting *Couch on Insurance*, stated that the issue was whether "the combination of steps allegedly taken by the insurer, and the strength of the proof that they were, in fact, taken, which determines whether the efforts were diligent." Slip opinion, p 3. The Court of Appeals effectively held, therefore, that the question of fact is not whether the insured breached the contract by not cooperating, but, instead, whether the insurer used reasonable diligence in taking steps in an effort to obtain the insured's cooperation. Nowhere in the contract is there any language to suggest that the insurer must use reasonable diligence to take steps in

an effort to obtain the insured's cooperation. This is judicial activism at its worst. The case law cited in Argument I is equally applicable with respect to this issue. The Court of Appeals disregarded the plain language of the contract and instead, inserted something into the contract which is not there.

Consequently, the Court of Appeals, by imposing such a requirement, has failed to follow the holdings of this Court in *Wilkie*, supra and *Quality Products & Concepts Co*, supra. Garnishee-Defendant/Appellant North Pointe Insurance Company, therefore, respectfully requests that this Honorable Court grants its application for leave to appeal so that these issues can be fully addressed, or, in the alternative, to peremptorily reverse the Court of Appeals' decision and remand to the trial court for entry of summary disposition to North Pointe.

III. THE TRIAL COURT CORRECTLY GRANTED SUMMARY DISPOSITION WHEN ALL OF THE EVIDENCE DEMONSTRATED THAT THE INSURED WAS INTENTIONALLY NOT COOPERATING WITH THE INSURER (BECAUSE THE INSURED HAD FILED FOR CHAPTER 7 BANKRUPTCY, THEREBY DISCHARGING ITS DEBTS), IN DIRECT CONTRAVENTION OF THE COOPERATION CLAUSE OF THE INSURANCE CONTRACT.

Even if the Court of Appeals' determination that the insurer must demonstrate "prejudice" and that the fundamental mutuality requirements of contract law are not applicable to the instant insurance contract, reasonable minds cannot differ but that the insured willfully failed to cooperate in this case, in direct violation of the insurance contract. All of the evidence at the trial court demonstrated that the insured willfully chose not to cooperate in the defense of this case.

Even if the law as applied by the Court of Appeals is accepted, North Pointe's Application for Leave to Appeal should be granted because the Court of Appeals' decision is in direct contravention to this Court's holding in *Koski v Allstate Ins.*, 456 Mich 439; 572 NW2d 636 (1998). The Court should also grant leave to appeal because the Court of Appeals' decision is inconsistent with the Court of Appeals' unpublished decision of *Hastings Mutual Ins Co v Auto Owners Ins Co*,

Docket No. 232947, decided September 17, 2002 (attached hereto as North Pointe's Exhibit "W").

This Court, in *Koski*, held that the insured's cooperation in forwarding legal papers was a condition precedent to the insurer's liability on the policy. *Koski*, 441-442. In *Koski*, the insured violated the provision of the policy which required the insured to notify the insurer of the action and to forward all legal paperwork to the insurer. As in the instant case, as a result of the insured's violation of the terms of the policy, the plaintiff obtained a default judgment. The plaintiff then filed a declaratory judgment action against Allstate in an attempt to obtain the proceeds of the default judgment from Allstate.

This Court held as follows:

> In this case, plaintiff's duty to immediately forward any legal papers relating to a claim is a condition precedent to Allstate's liability under either policy. Ordinarily, one who sues for performance on a contractual obligation must prove that all contractual conditions pre-requisite to performance have been satisfied.

Koski, at p 44.

As in the instant case, this Court noted in *Koski* that the insurer was deprived of the opportunity to engage in discovery to prepare a proper defense. This Court, accordingly, held that judgment should be entered in favor of the insurer. *Koski*, at 448.

In *Koski*, it does not appear as though the defendant raised the issue of whether additional terms should be written into an insurance contract, which would not ordinarily be written into a contract. This Court, *in dicta,* indicated that it was following the majority position that an insurer must establish actual prejudice to its position in order to deny coverage. It does not appear as though that issue was ever presented to the Court, therefore, such dicta is not precedentially binding.

Even if the Court, however, follows that requirement, as in *Koski*, it is clear that the defendant did establish actual prejudice to its position. If North Pointe had obtained the cooperation of its insured, it could have defended the case. As a result of the insured's willful non-

cooperation, a default judgment was entered against the insured.

It is clear that the non-cooperation in this case was willful, intentional and blatant. Because the insured's debts far exceeded any assets that it had, the insured was confident that the claim would be discharged pursuant to Chapter 7 of the United States Bankruptcy Code. The insured, therefore, "thumbed its nose" at the legal process and simply indicated that it was bankrupt and could do nothing further.

The contract was between the insured and the insurer. The plaintiff was not a third party beneficiary to the contract. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422; 670 NW2d 651 (2003). The personal injury plaintiff in the instant case has no standing to submit a claim under the policy. The only way to make such a claim is to "step into the shoes" of the insured, the Royal Oak Music Theater, in an effort to collect the default judgment against North Pointe. To avail himself of the benefits of the insured's policy, the plaintiff must also be charged with the breaches of the contract committed by the insured. In other words, if the insured violated the contract, then the underlying plaintiff will be held to have also violated the terms of the contract.

A breach of the cooperation clause generally results in forfeiture of coverage, thereby relieving the insurer of its liability to pay, and provides the insurer an absolute defense to an action under the policy. *Flamm v Scherer*, 40 Mich App 1; 198 NW2d 702 (1972).

> [Cooperation clauses] have been denominated as a condition precedent to liability under the contract or as a condition subsequent which may operate as a defeasance of a liability which is already attached. Such provision is a material part of the policy and a breach of the provision by the insured, in a material respect, constitutes a defense to liability on the policy, in the absence of waiver or estoppel of the insured.

44 Am Jur 2d Ins §130.

This Court has held that "**[t]he rule seems to be well established that if a person contracts in an insurance policy to do certain things, he is required to do them.**" *Brogdon v American Automobile Ins Co*, 290 Mich 130, 135; 287 NW 406 (1939) (emphasis supplied).

It is clearly the law in Michigan, as well as in most jurisdictions, that the conditions and terms of the insurance contract must be met in order for the insurer to be obligated to pay out insurance proceeds. There is no requirement that a party to a contract seek judicial approval prior to completing his or her obligations. See *Brogdon*, supra; *Sasanas v Manufacturers National Bank of Detroit*, 130 Mich App 812; 345 NW2d 621 (1983). A condition, such as a cooperation clause, is intended to force a party to the contract to meet that condition before there is a right to performance. Id. Consequently, the insured must have cooperated with North Pointe in the defense of this action in order for the insured to maintain its general liability insurance coverage.

The Court of Appeals' decision in the instant case is inconsistent with the Court of Appeals case of *Hastings Mutual Ins Co v Auto Owners Ins Co*, supra, attached hereto as Defendant's Exhibit "W". As in the instant case, the plaintiff obtained a default judgment against the insured because the insured failed to cooperate in its own defense. The underlying plaintiff then filed suit against the insurer for payment under the default judgment.

The Court in *Hastings Mutual* found that the insurer established that it suffered prejudice as a result of the insured's failure to cooperate. In *Hastings Mutual*, the defendant presented documentary evidence establishing that it was materially prejudiced because the insured would not cooperate. In *Hastings Mutual*, as in the instant case, the insurance company hired defense counsel to defend the insured. Defense counsel was unable to secure requested documents or to secure the insured's cooperation in the defense of the case. The insured's defense counsel was forced to withdraw as counsel. The Court found that there was ample evidence in the record showing the insurance company's efforts to communicate with its insured and to encourage his cooperation. *Hastings Mutual*, p 30.

The same rationale applies to the instant case. The facts of *Hastings Mutual* appear to be identical. In the instant case, there is substantial evidence, including extensive written correspondence, telephone calls, the affidavit of Mr. Ewing, deposition testimony, and other

documentation demonstrating that North Pointe and Mr. Ewing repeatedly and painstakingly attempted to obtain the cooperation of its insured. **All** of the evidence demonstrates that North Pointe and Mr. Ewing repeatedly attempted to obtain the insured's cooperation. Juxtaposed to this voluminous evidence presented to the trial court, the plaintiff has submitted **no** evidence to demonstrate that the insured cooperated, or even attempted to cooperate. Reasonable minds could not differ.

In *Thomson v State Farm Ins Co*, 232 Mich App 38; 592 NW2d 82 (1999), the Michigan Court of Appeals held that an insured's willful non-compliance of an insurance agreement, by failing to comply with the clause requiring an examination under oath (EUO), requires dismissal with prejudice in favor of the insurer. In that case, the insureds violated the clause of the policy requiring them to attend an EUO. The *Thomson* Court held:

> [W]e conclude that **"willful non-compliance"** in the context at hand **refers to a failure or refusal to** submit to an EUO or otherwise **cooperate with an insurer in regard to contractual provisions** allowing an insurer to investigate a claim that is part of a *deliberate* effort to withhold material information or **a *pattern of non-cooperation* with the insurer**.

Thomson, at 50-51 (emphasis supplied).

In the instant case, there was not only a pattern of non-cooperation, but there was a deliberate pattern of non-cooperation. In the instant case, the insured submitted no information. The insured provided no list of employees that worked on the evening in question. The insured presented no schedules of who was working. The insured did not provide accounting records which would have employee/witness information. The insured did not provide surveillance tapes. The insured did not provide incident reports, nor did the insured indicate that there was no incident report. This case presented a much more severe case of non-cooperation than the other cases cited above.

This Court, in *Atlanta Int'l Ins Co v Bell*, 438 Mich 512; 475 NW2d 294 (1991), held that

defense counsel, who was hired by an insurer to defend an insured, has an attorney client relationship with the insured and owes a duty only to the insured. An attorney has an ethical obligation to keep a client reasonably informed and to communicate with the client. Michigan Rule of Professional Conduct 1.4. Communication, however, must be a two way street. An attorney cannot ethically represent a client who will not cooperate or communicate with the attorney. As such, Mr. Ewing had no choice but to move to withdraw when he could not obtain the cooperation of his client.

The prejudice could not be clearer. The prejudice, quite simply, is the default judgment entered against the insured. From a policy standpoint, it makes no sense to allow an insured to file for bankruptcy, thumb its nose at its insurance company and thereby cause the insurance company to be liable for thousands of dollars that result in a default judgment against that insured. Although the plaintiff may be left without a recovery, as noted, the clear law in this state is that the plaintiff is not a third party beneficiary to the contract. Unfortunately, our judicial system cannot remedy every wrong. In fact, such a situation is not unusual. Oftentimes a party has been legitimately wronged and has obtained a judgment for which there is no insurance. Those judgments go uncollectible. Although it may not seem fair to an injured plaintiff, our legal system and our government cannot right every wrong, nor can the courts or government guarantee compensation for every injury.

Reasonable minds could not differ but that the insured willfully chose to not cooperate with the defense of this case because it had filed for bankruptcy. As such, the insured materially breached the contract. The trial court correctly found so and granted North Pointe's motion for summary disposition. Garnishee-Defendant/Appellant North Pointe Insurance Company respectfully requests that this Honorable Court grants its Application for Leave to Appeal so that these issues can be fully addressed, or, in the alternative, to peremptorily reverse the Court of Appeals' decision and reinstate the trial court's order granting North Pointe summary disposition.

CONCLUSION

The Court of Appeals committed error by requiring that Garnishee-Defendant/Appellant North Pointe Insurance Company demonstrate that it was prejudiced by the insured's breach of contract. The Court of Appeals was similarly in error in requiring that the Garnishee-Defendant North Pointe Insurance Company must continue to perform its part of the bargain despite the insured's breach of contract, in contravention of long-standing Michigan contract law. Finally, even if the Court of Appeals correctly held that North Pointe must demonstrate prejudice and correctly held that the typical mutuality requirement of contract law is not required in the context of an insurance contract, the Court of Appeals nevertheless committed error by finding that there was an issue of fact created for the trier of fact as to whether the insured breached the cooperation clause of the contract so as to materially prejudice North Pointe.

RELIEF REQUESTED

Garnishee-Defendant/Appellant North Pointe Insurance Company respectfully requests that this Honorable Court grant its Application for Leave to Appeal, or, in the alternative to peremptorily reverse the Court of Appeals and remand back to the trial court for reinstatement of the trial court's opinion and order granting North Pointe summary disposition.

KALLAS & HENK, P.C.

SCOTT L. FEUER (P38185)
Attorney for Garnishee-Defendant/Appellant
North Pointe Insurance Company
43902 Woodward Avenue, Suite 200
Bloomfield Hills, MI 40302-0556
(248) 335-5450, Ext. 219

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